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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KYRIAN RASHON KELLEY,

Defendant and Appellant.

D074701

(Super. Ct. No. FVI17000523)

APPEAL from a judgment of the Superior Court of San Bernardino County, Debra Harris, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Kyrian Rashon Kelley of driving or taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a); count 1). At a bifurcated bench trial, the

trial court found true that Kelley had two prior strike convictions for which he served time in prison (Pen. Code,¹ §§ 667, subds. (b)-(i), 667.5, subd. (b), 1170.12, subds. (a)-(d)).

The court sentenced Kelley to prison for seven years, consisting of: the upper term of three years for count 1, doubled to six years under the Three Strikes law, and a consecutive one-year term for a prison prior.

Kelley appeals, contending: (1) substantial evidence does not support his conviction, (2) the trial court abused its discretion by admitting evidence of a ring of keys that were not preserved or produced at trial, (3) the trial court abused its discretion by permitting expert testimony regarding the ring of keys, and (4) the prosecutor committed *Griffin*² error as well as additional misconduct. We conclude Kelley's arguments lack merit. Accordingly, we affirm.

FACTUAL BACKGROUND

On February 11, 2017, Anita G. was running errands with her husband in her 1993 Honda Accord. When they returned to their apartment in Victorville, Anita parked the car, locked it, and did not drive the car again that day. She left her registration and proof of insurance in the car's glove box. The next day, Anita noticed her car was gone. She had not given anyone permission to drive her car. In addition, she possessed the only two keys to the car. Anita reported the car theft to the police.

¹ Statutory references are to the Penal Code unless otherwise specified.

² *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

On February 17, 2017, at about 9:30 a.m., San Bernardino County Sheriff's Office Service Specialist Gilbert Bracamontes was driving a marked patrol vehicle, when he observed a Honda Accord "moving pretty quickly" around Avalon Street and Fifth Street in Victorville. Bracamontes ran the Honda's license plate and discovered it had been reported stolen. Bracamontes notified dispatch and continued to follow the vehicle from about three car lengths back.

The Honda made four or five left and right turns in rapid succession, with each turn being made as soon as it became an option. Ultimately, the Honda turned on to a dead-end street and pulled into a residential driveway on that street. Bracamontes had maneuvered his patrol car to a vantage point a couple houses away that allowed him to see an African-American male, the driver, and an African-American female, the passenger, get out of the car. At that point, sheriff's deputies had arrived.

Deputy Nicolas Craig arrived at the residence where the Honda had pulled into the driveway and saw the occupants at the vehicle. He contacted Kelley, and his passenger, M.E., and subsequently arrested Kelley. During a search incident to the arrest, no weapons or keys were found on Kelley. Kelley waived his *Miranda*³ rights and explained that he was driving the car. He also admitted that he was a transient. Craig indicated in the CHP 180 report⁴ that the key intended for the Honda's operation was not

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

present. Craig also noticed there was trash in the Honda and the car stereo was missing. However, another deputy, not Craig, searched the Honda.

About 20 to 25 minutes after Craig arrived, Anita, who was contacted about the recovery of her car, came to pick it up. Anita found her car registration and proof of insurance in the car, but there were other items in the car that did not belong to her. Anita noticed keys hanging from the ignition. She easily removed a key from the ignition, which appeared to have been shaved on its edge and was smooth. There were about 10 keys on a key ring. Some of the keys had Honda logos and some were newer Honda key fobs with buttons. Anita signed for the release of her car and left.

At trial, Anita testified that before she left with her car, she gave the keys she found in it to a deputy, but she did not recall the deputy's name.

Craig testified at trial that he had talked to Anita, but he had no recollection that she had given him or any deputy a ring of keys that she found in the car. In addition, Craig testified, based on his training and experience, that shaved keys are commonly used in vehicle thefts. Craig had experience in recovering Hondas where shaved keys had been used in the thefts. In Craig's opinion, shaved keys on a key ring with multiple Honda keys could be consistent with an intent to steal or an intent to operate a stolen vehicle.

⁴ A CHP 180 report relates to stolen or recovered vehicles. It includes details regarding the subject vehicle.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

A. Kelley's Contention

Kelley argues substantial evidence does not support his conviction for driving or taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)). We disagree.

B. Standard of Review

We review a sufficiency of the evidence claim under the familiar and deferential substantial evidence standard of review. (See *People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) Substantial evidence is evidence that is "reasonable, credible, and of solid value." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) In reviewing for substantial evidence, we presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (See *People v. Lee* (2011) 51 Cal.4th 620, 632.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

"When a jury's verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the

determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury. It is of no consequence that the jury believing other evidence, or drawing different inferences, might have reached a contrary conclusion." (*People v. Brown* (1984) 150 Cal.App.3d 968, 970.) Whether the evidence presented at trial is direct or circumstantial, the relevant inquiry on appeal remains whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (See *People v. Manibusan* (2013) 58 Cal.4th 40, 92.) Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. (See *People v. Dominguez* (2010) 180 Cal.App.4th 1351, 1356.)

C. Analysis

"The elements necessary to establish a violation of section 10851 of the Vehicle Code are the defendant's driving or taking of a vehicle belonging to another person, without the owner's consent, and with specific intent to permanently or temporarily deprive the owner of title or possession." (*People v. Windham* (1987) 194 Cal.App.3d 1580, 1590 (*Windham*)). "Specific intent to deprive the owner of possession of his car may be inferred from all the facts and circumstances of the particular case. Once the unlawful taking of the vehicle has been established, possession of the recently taken vehicle by the defendant with slight corroboration through statements or conduct tending to show guilt is sufficient to sustain a conviction of Vehicle Code section 10851."

(People v. Clifton (1985) 171 Cal.App.3d 195, 200; accord *Windham*, at pp. 1590-1591; *People v. Green* (1995) 34 Cal.App.4th 165, 181.)

With these principles in mind, we conclude the record includes ample evidence on which the jury could have convicted Kelley of violating Vehicle Code section 10851. Anita did not give Kelley permission to drive her Honda. Therefore, Kelley drove the car without the owner's permission. Further, the jury was entitled to infer Kelley intended to deprive Anita either permanently or temporarily of possession of her car, based on the totality of the circumstances. (See *Windham, supra*, 194 Cal.App.3d at pp. 1590-1591.) Kelley was discovered driving the Honda six days after it was stolen. Kelley, while driving the Honda and being followed by a marked patrol vehicle, made several left and right turns. Kelley ultimately turned into a residential driveway on a dead-end street, and there is no indication in the record to connect Kelley or his passenger in the car to the subject residence. Anita testified that she found a ring of about ten keys in her car, some of which were Honda keys that had been shaved. Craig opined at trial that the presence of shaved keys could be consistent with an intent to steal or an intent to operate a stolen vehicle.

In short, substantial evidence supports Kelley's conviction based on the record before us.

II

THE TESTIMONY ABOUT THE RING OF KEYS

A. Kelley's Contentions

Kelley maintains the trial court abused its discretion by permitting Anita to testify about the ring of keys she found in her car when those keys were not preserved, provided to the defense during discovery, and not produced at trial. Kelley further asserts he was prejudiced by the court's abuse of discretion. We are not persuaded.

B. Background

Before trial, Kelley's trial counsel moved to exclude evidence related to a ring of keys Anita found in her Honda when she recovered it. He claimed the prosecutor committed a discovery violation, under section 1054, concerning the keys. Defense counsel noted that he did not receive a report that the sheriff's department received any keys in connection to obtaining the Honda and returning it to Anita. Thus, he maintained the set of keys should not be produced at trial and no witness be permitted to testify regarding them.

The prosecutor explained that Anita stated that when the Honda was returned to her, there was a key in the ignition. That key was one of about a dozen keys on a key ring. None of the keys on the ring was an actual key to the Honda. The prosecutor emphasized that as soon as he was told that Anita had found the keys on a key ring, he "instantly" informed defense counsel. He also admitted there was no mention of the keys in the CHP 180 report, but instead, that report stated that the Honda did not have its

actual ignition keys when the deputies recovered it. The prosecutor stated there was no reason for testimony about the keys to be excluded at trial.

Defense counsel countered that there would be foundational issues if the keys were entered into evidence or a witness testified about them. To this end, counsel noted there was no "information available as to where the keys could have come from[.]"

The trial court found no discovery violation by the prosecutor and denied Kelley's request to exclude evidence of the keys on that basis. However, the court determined that a limited Evidence Code section 402 hearing was appropriate and allowed defense counsel to ask certain foundational questions of Anita. To this end, counsel asked her, among other things, if there was a key in the ignition of her car when she took possession of it after it was taken. Anita responded that there were "quite a few keys on a key chain that weren't" hers and that she gave the keys to "one of the officers" but she did not recall which officer. Anita indicated that she saw "several Honda keys" on the key ring and that some of the keys included an alarm (a key fob with push buttons). She also testified that the key in the Honda's ignition was shaved and a couple of other keys on the key ring appeared to be shaved as well. Anita described the shaved keys as not having "the shape of a key" in that the key "was just straight" and did not "have ridges around the key." She compared a shaved key to her fingers, agreeing that "there was no details" on the key.

After Anita finished testifying at the Evidence Code section 402 hearing, Kelley's trial counsel again argued that the prosecution committed a discovery violation regarding the keys found by Anita because there was no indication in any of the reports or what was produced to defense in discovery that the sheriff's department collected the keys.

Defense counsel emphasized that the keys were not preserved and no picture was taken of the keys. He therefore renewed his request that the trial court exclude any evidence about the keys during trial based on discovery violations.

The prosecutor countered that there were no grounds to exclude the evidence. He pointed out that the CHP 180 report indicated that the specific key for the stolen Honda was not present, which put defense counsel on notice that the car "was operated by another means." The prosecutor also represented to the court that Craig would testify that he has no recollection of receiving the keys. He further emphasized that there was no evidence of any negligence by law enforcement in handling the keys. He concluded by noting that defense counsel could highlight the missing keys as part of an inadequate investigation to impeach both Anita and Craig at trial.

The court again denied defense counsel's objection, stating that his complaints about the evidence concerned the weight the jury should give the evidence, not its admissibility.

C. Relevant Legal Principles

Here, Kelley maintains the prosecutor violated section 1054 in not preserving, producing in discovery, and/or providing at trial, the ring of keys Anita testified that she found and provided to a deputy. As we explain below, we conclude the trial court did not abuse its discretion in denying Kelley's motion to prohibit Anita from testifying about the ring of keys. (See *People v. Thompson* (2016) 1 Cal.5th 1043, 1105.)

Section 1054 et seq. dictates "an almost exclusive procedure for discovery in criminal cases" in this state. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th

1305, 1311 (*Barrett*); see § 1054, subd. (e); *In re Littlefield* (1993) 5 Cal.4th 122, 129 (*Littlefield*.) It provides "the only means for [a] defendant to compel discovery 'from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.' " (*In re Steele* (2004) 32 Cal.4th 682, 696, quoting § 1054.5, subd. (a).)

Within this statutory scheme, the prosecutor's disclosure obligations are found in section 1054.1. As pertinent here, that section requires the prosecuting attorney to share with defense counsel "[a]ll relevant real evidence seized or obtained as part of the investigation of the offenses charged" and "[a]ny exculpatory evidence." (§ 1054.1, subds. (c), (e).) A prosecutor must make the required disclosures at least 30 days before trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. (§ 1054.7.)

Section 1054.1 is notably caveated: The information named must be disclosed only "if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies." (§ 1054.1.) Case law has interpreted this requirement to encompass not only information actually possessed but that " 'within the possession or control' of the prosecution" or put another way, " 'reasonably accessible' to it." (*Littlefield, supra*, 5 Cal.4th at p. 135; accord *People v. Little* (1997) 59 Cal.App.4th 426, 431-432.)

Independent of our criminal discovery statutory scheme, the federal constitution imposes a duty of disclosure on the prosecution. (*Barrett, supra*, 80 Cal.App.4th at

p. 1314; see § 1054, subd. (e).) Under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and its progeny, a prosecutor must disclose material exculpatory evidence (*Brady* material) to a criminal defendant whether requested or not. (*Id.* at p. 87; accord *In re Brown* (1998) 17 Cal.4th 873, 879 (*Brown*).)

"The scope of [the *Brady*] disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge 'any favorable evidence known to others acting on the government's behalf.' " (*Brown, supra*, 17 Cal.4th at p. 879, quoting *Kyles v. Whitley* (1995) 514 U.S. 419, 437.) This is so because those "acting on the government's behalf" are said to be part of the "prosecution team," and their knowledge is, in turn, imputed to the prosecutor. (*Brown*, at p. 879, internal quotation marks omitted.)

For *Brady* purposes, evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness. (*United States v. Bagley* (1985) 473 U.S. 667, 674, 676; see *In re Sassounian* (1995) 9 Cal.4th 535, 544.) Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. (E.g., *Banks v. Dretke* (2004) 540 U.S. 668, 698-699.) Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. (*Bagley*, at pp. 682-683; see *Brown, supra*, 17 Cal.4th at p. 887.)

In addition to the prosecutor allegedly failing to timely produce discovery in the instant action, Kelley also challenges the deputies' handling of the ring of keys. Law enforcement agencies have a duty to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479,

488 (*Trombetta*). To fall within the scope of this duty, evidence must be "constitutional[ly] material[]," meaning it "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable available means." (*Id.* at p. 489.) California has adopted the *Trombetta* standard. (See *People v. Beeler* (1995) 9 Cal.4th 953, 976-977.) If "no more can be said [of the evidence] than that it could have been subjected to tests, the results of which might have exonerated the defendant," a due process violation will be found only if law enforcement acted in bad faith. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 (*Youngblood*)). If a defendant demonstrates that significant exculpatory evidence was lost or establishes bad faith in connection with the loss of potentially useful evidence, then the trial court has discretion to impose appropriate sanctions.⁵ (*People v. Medina* (1990) 51 Cal.3d 870, 894.)

Negligent destruction or failure to preserve potentially exculpatory evidence, without evidence of bad faith, will not give rise to a due process violation. (*Youngblood, supra*, 488 U.S. at p. 58.) A finding as to "whether evidence was destroyed in good faith or bad faith is essentially factual: therefore, the proper standard of review is substantial evidence." (*People v. Memro* (1995) 11 Cal.4th 786, 831.) On review, an appellate court must determine whether, viewing the evidence in the light most favorable to the trial

⁵ Sanctions for discovery violations include "immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter," and advising "the jury of any failure or refusal to disclose and of any untimely disclosure." (§ 1054.5, subd. (b).) Only if all other sanctions have been exhausted, the court may prohibit the testimony of a witness under section 1054.5, subdivision (b). (§ 1054.5, subd. (c).)

court's finding, there was substantial evidence to support its ruling. (*People v. Carter* (2005) 36 Cal.4th 1215, 1246.)

D. Analysis

Below, the trial court denied Kelley's motion to exclude any testimony about the ring of keys based on alleged discovery violations. On the record before us, we conclude the court did not abuse its discretion in denying Kelley's motion. In addition, we determine that Kelley did not show the prosecution acted in bad faith in failing to preserve the ring of keys.

A court abuses its discretion in the context of discovery rulings when it exceeds the bounds of reason. (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 49; see *People v. Giminez* (1975) 14 Cal.3d 68, 72.) At trial, when Kelley raised the issue of the late disclosure of Anita's statement concerning the ring of keys, the prosecutor explained that the information was provided to the defense immediately after it was discovered, about a week earlier. In response to the foundational issues raised by Kelley, the court ordered an Evidence Code section 402 hearing. We see nothing unreasonable in how the trial court dealt with Kelley's objections to Anita's testimony about the ring of keys.

That said, in the instant matter, Kelley focuses on the ring of keys and the fact they were not produced in discovery or at trial. He characterizes the ring of keys as "material exculpatory evidence" to support his position. However, Kelley merely speculates that an examination of the keys might indicate the keys' owner or reveal how many of the keys were shaved. Indeed, he refers to the possibility that the keys belong to a

repossession company, but there is no evidence in the record that the Honda was ever in the possession of a repossession company.

Contrary to Kelley's assertions, evidence in the record strongly suggests that the missing ring of keys are more inculpatory than exculpatory. Anita testified that she possessed the only two keys to her Honda. As such, the car had to be started by some other means. The presence of a ring of keys in the stolen Honda, many of them actually Honda keys, with at least a couple of the keys shaved, strongly supports the inference that Anita's car was stolen. Kelley's claim that the ring of keys is somehow exculpatory appears to be created out of whole cloth.

Kelley also contends that even if we determine the keys were not exculpatory, "they certainly fall into the category of potentially useful evidence," and the government cannot act in bad faith in failing to preserve the evidence. (See *Youngblood, supra*, 488 U.S. at p. 58.) However, Kelley only baldly asserts the prosecution acted in bad faith in failing to preserve the ring of keys: "The deputy who received the keys had to realize the keys found in the ignition of a stolen vehicle would potentially be valuable evidence and that examination of the keys themselves instead of just hearing they existed would be valuable trial evidence. It is thus quite accurate to say that the deputy acted in bad faith rather than just acting negligently." Kelly offers no evidence to show the sheriff's department acted in bad faith by knowingly failing to preserve evidence that was even potentially useful. Although Anita testified that she gave the ring of keys to a deputy, she did not know which deputy she gave them to and could not describe that deputy at trial. No one from the sheriff's department testified to having been given the ring of keys or

even seeing the ring of keys. Thus, even assuming that Anita did give the ring of keys to a deputy, there is nothing in the record supporting the allegation that the deputy receiving the keys, destroyed or failed to preserve those keys in bad faith. Therefore, Kelley has not shown that his due process rights were violated. (See *Youngblood*, at p. 58 ["[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."].)

III

EXPERT WITNESS TESTIMONY ABOUT THE RING OF KEYS

A. Kelley's Contentions

Kelley next challenges the admission at trial of Craig's opinion that shaved keys were common in vehicle thefts. He argues Craig's opinion was improper because Anita's description of the keys was "sketchy," and Craig had no personal knowledge of the keys. We disagree.

B. Background

At trial, Anita testified that she found about 10 keys on a key ring in her Honda after she recovered it. She stated that some of the keys had Honda logos on them. She also explained that when she removed one of the keys from her Honda's ignition, the key slipped out easily because it had been shaved on its edge. Anita said that she gave the keys to "one of the officers" but did not recall who it was. She explained there were "quite a few officers" at the scene.

Craig later testified at trial. Craig was a sheriff's deputy who was at the scene when the Honda was recovered. He arrested Kelley. He had "extensive experience

recovering stolen vehicles, particularly Hondas, probably several dozen, including shaved keys related to it either during the theft or recovery or work related." He explained that shaved keys are "extremely common" in vehicle thefts, including thefts of Honda cars. Over a defense objection, Craig testified that the presence of a key ring with ten keys on it, with multiple keys being for Honda cars and some of those keys being shaved, could be consistent with someone stealing or intending to operate a stolen vehicle.

Craig testified that he did not remember being handed a ring of keys from the Honda. He also stated that he did not recall hearing from any of the other deputies at the scene that they received any keys retrieved from the Honda. He admitted that he had no personal knowledge whether there was a shaved key involved with the theft of the Honda in this matter.

C. Analysis

We review the trial court's ruling on the admissibility of expert testimony for abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 (*Sargon*)). A court abuses its discretion if its ruling is " 'so irrational or arbitrary that no reasonable person could agree with it.' " (*Ibid.*) "It is the appellant's burden on appeal to show the trial court abused its discretion." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.)

Evidence Code section 801 allows expert testimony regarding topics "sufficiently beyond common experience" that will "assist the trier of fact." (Evid. Code, § 801, subd. (a); *Sargon, supra*, 55 Cal.4th at pp. 769-770.) Expert testimony "will be excluded only when it would add nothing at all to the jury's common fund of information, i.e.,

when 'the subject of inquiry is one of such common knowledge that men [and women] of ordinary education could reach a conclusion as intelligently as the witness' [citation]."

(People v. McDonald (1984) 37 Cal.3d 351, 367.)

Here, Kelley argues Craig could not provide an expert opinion about the ring of keys because it was not preserved, and Craig based his opinion on the "sketchy description" Anita provided at trial. We are not persuaded.

The fact the ring of keys was not produced in discovery or at trial does not undermine Craig's opinion. Craig did not opine about the type of keys found in the Honda after it was retrieved and Kelley was arrested. Indeed, he admitted that he had no personal knowledge whether shaved keys were involved in the theft of the Honda. Instead, Craig explained that, in his experience as a sheriff's deputy, shaved keys are "extremely common" in car thefts. Moreover, after stating he had experience with thefts involving Honda vehicles, he testified that shaved keys are common in the theft of Honda vehicles. Based on Anita's description of the ring of keys,⁶ Craig opined that such a ring of keys "could be consistent with someone" stealing or intending to operate a stolen vehicle. Such testimony is helpful to the jury as it concerns a topic "sufficiently beyond

⁶ In his opening brief, Kelley repeatedly refers to Anita's testimony about the ring of keys as "sketchy," but he does not offer any cogent explanation to support his characterization. Anita described the ring of keys as she claimed to have found them. Further, before she was permitted to testify, the court held an Evidence Code section 402 hearing to probe foundational issues. Kelley's trial counsel was able to cross-examine Anita about the keys and argue to the jury that Anita was lying or not remembering correctly. Kelley's challenge to the testimony about the ring of keys and Craig's opinion about use of shaved keys in car thefts goes to the weight of the evidence and not its admissibility.

common experience." (Evid. Code, § 801, subd. (a); *Sargon, supra*, 55 Cal.4th at p. 769.) Thus, the trial court did not abuse its discretion in permitting Craig to offer expert testimony.

IV

PROSECUTORIAL ERROR

A. Kelley's Contentions

Kelley asserts that the prosecutor committed *Griffin* error as well as prejudicial prosecutorial misconduct during the rebuttal closing argument. Specifically, he contends during rebuttal closing argument, the prosecutor commented on Kelley's failure to testify, referred to facts not in evidence, commented on the defense's failure to call a witness without having shown the witness was available, and attempted to shift the burden of proof.

As a threshold matter, the People argue Kelley forfeited these arguments by failing to make the specific objections raised here. (See *People v. Valencia* (2008) 43 Cal.4th 268, 281.) Kelley's trial counsel objected twice during the prosecutor's rebuttal closing argument. Both the objections were unspecific. However, the court sustained each objection and, at least for the first objection, admonished the jury per defense counsel's request. In addition, out of the presence of the jury and after the conclusion of closing arguments, the court and counsel discussed at length the objections and the rebuttal closing argument, including explicitly addressing defense counsel's objections. This additional context allows us to ascertain the substance of counsel's objections at trial. Accordingly, we do not find a general forfeiture argument applicable here. That said, in

the subsections below, we will address the People's claim that some of Kelley's specific arguments raised here have been forfeited by not properly objecting at trial.

B. Background

In closing argument, the prosecutor argued that the purpose of Kelley's unauthorized possession of Anita's vehicle was to deprive her of her ownership interest. The prosecutor focused on the circumstantial evidence that Kelley was driving a stolen vehicle, there was a shaved key in the ignition, and Anita maintained possession of the only two keys to the car. The prosecutor also reminded the jury that there was no evidence that Kelley had any right or any reason to possess the car. Anita had testified that she had not given Kelley permission to drive her car. And the car's registration and insurance were in Anita's name.

In response, Kelley's trial counsel insisted that the evidence did not establish Kelley's intent to deprive Anita of ownership or possession of the Honda. Defense counsel thus emphasized Craig's inability to recall the keys left in the Honda before Anita retook possession. He also maintained that Anita's description of the ring of keys was not credible. Counsel further argued that Anita's description of the keys was suspect, rendering Craig's opinion meaningless. Defense counsel pointed out that a car thief would not leave the owner's registration and insurance in the stolen vehicle. In addition, he suggested that "the other person who was in the car" with Kelley was the "possessor" of the Honda; however, there was no evidence concerning her involvement.

During rebuttal closing argument, the prosecutor claimed that Kelley's trial counsel was asking the jurors to speculate. To this end, he stated:

"All right. Ladies and gentlemen, we're on the home stretch, and why I showed you that circle when I got up the first time is because a lot of what defense counsel just told you is basically you got to speculate. He's asking you to speculate about keys. He's asking you to speculate about the passenger in the car. Is he speculating a suggestion to you that she is somehow the owner of the vehicle? What did we not hear? We never—defense never called any witness that said, that's my car."

Defense counsel objected to the argument, and the court sustained the objection.

The attorneys approached the bench for a sidebar where the prosecutor argued why his statement about Kelley failing to call a witness was appropriate. The court disagreed, noting that a defendant does not have to present witnesses. Defense counsel then asked the trial court to admonish the jury, and the court did so as follows:

"Statements of counsel that's made in closing argument is not evidence, it's not the law. The People have the burden of proving the case beyond a reasonable doubt. You are to follow all of the instructions as a whole and follow the law as I give it to you. Thank you."

The prosecutor then continued:

"Ladies and gentlemen, the passenger in the vehicle is the passenger. You've heard no evidence about her. Counsel is asking you to speculate, who is she? Did she have keys? If there's anything that was relevant in this case, there's the ability for counsel to call them as a witness and contradict the evidence in this case."

Defense counsel again objected, and the court sustained the objection. The objection led to another sidebar with the court emphasizing to the prosecutor that the defense does not have to present any evidence. Kelley's trial counsel did not ask the court to admonish the jury after the objection was sustained.

The prosecutor then continued his rebuttal closing without defense counsel raising any additional objections.

After the conclusion of closing argument and outside the presence of the jury, the attorneys and the court further discussed defense counsel's objection to portions of the prosecutor's rebuttal closing argument. The prosecutor stated:

"My issue with the Court's ruling and counsel's what I believe to be meritless objection is, I'm entitled to protect my case when counsel makes arguments that goes [*sic*] to the state of the evidence. My response was to the state of the evidence, not to the defendant's failure to testify. I think that case law's been very clear that a prosecutor cannot make comments on a defendant's failure to testify. I know that, and I did not feel that my comments touched that issue 'cause that is a quick way to have bad things happen to my case. But the Court of Appeals and the Supreme Court itself has also stated that the prosecutor can, and it is proper for a prosecutor to argue on the state of the evidence, that goes to the failure of the defense to call witnesses, to contradict the testimony of the prosecution witnesses. And the important thing is those cases have always been in response to defense argument.

"It's questionable if it's me coming right out of the gate in my own closing. But I also have the ability to talk about the defense comments and remarks, when I'm confining them to the absence of evidence or even alibi-type comments defense has made when bringing in this case, specifically the passenger, and insinuating that she could have had keys, that she could have had knowledge, and now I'm left with not having any ability to make comments on that evidence.

"I know the Court doesn't recall some of those comments, but there was a line of comment that went to the deputy, Deputy Craig, his failure to interview [the passenger], although not to be named by name in argument of counsel, that she could have had keys to the car.

"So what we have now is essentially question marks with the jury on the state of the evidence that I then very intentionally wanted to respond to, and made sure that my comments in no way brought in

the defendant's, obviously his right not to testify, but I feel that case law supports my ability, and in essence, almost, right has made it a little bit strong, but my right to make those comments and argument to have my case and my trial."

The court responded as follows:

"Three things. First off, I will say that I did not take your comments or confuse them that they were commenting on the defendant's failure to testify. [¶] The second point, when I said I was surprised, it was your tone. [¶] The third point—and I'm not gonna say that's what we have appellate court for. [¶] [Prosecutor's comment.] [¶] . . . [¶] I, in my opinion, your comments, your argument, was akin to burden shifting. It would have been different had [defense counsel] brought up it could have been her brother where she learned about the shaved keys or someone else. But this was a person that was interviewed or was at the scene with the officer and saying what the—going to the officer's investigation, that's different than saying, well, the defendant could call in, they could bring in their witnesses. [¶] He does not have to prove that he is not guilty. You have to prove that he is guilty. And [defense counsel's] argument, and I was listening closely, was bordering right along that. The People have not proved their case."

After a few more comments by the trial court, Kelley's trial counsel explained the he "was trying to stress within [his] argument . . . that there was another person present, and that person, there were things that might have been done in the investigation that weren't done. That's all I was arguing there. I don't believe I stepped over that line, but"

C. *Griffin* Error

Griffin, supra, 380 U.S. 609 prohibits the prosecutor from commenting on a defendant's failure to testify. (*People v. Vargas* (1973) 9 Cal.3d 470, 475.) "However, not every comment upon [the] defendant's failure to present a defense constitutes *Griffin* error. It is now well established that although *Griffin* prohibits reference to a defendant's

failure to take the stand in his own defense, that rule 'does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citations.] [Citations.]' (*Ibid.*) We evaluate claims of *Griffin* error by inquiring whether there is a reasonable likelihood that any of the challenged comments could have been understood to refer to Kelley's failure to testify. (*People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1523 (*Sanchez*)). As with any claim a prosecutor's comments constituted misconduct, we " 'do not lightly infer' " the prosecutor " 'intended [his (or her) remarks] to have their most damaging meaning, or that the jury would draw that meaning from the other, less damaging interpretations available.' " (*People v. Young* (2005) 34 Cal.4th 1149, 1192.)

Kelley alleges *Griffin* error based on the prosecutor commenting that the defense never called any witness that said, "[T]hat's my car." He also claims *Griffin* error based on the prosecutor's reference to the passenger in the Honda, insisting that the implication of such comments was that Kelley should have testified about who she was and whether she had keys to the Honda. The People contend Kelley forfeited any claim of *Griffin* error. The People have the better argument.

We see no indication in the record that the prosecutor commented on Kelley's failure to testify at trial. Kelley argues that the only person that could have testified that the Honda was his or her car other than Anita was Kelley. We disagree. The prosecutor made the objected to argument after claiming that defense counsel was asking the jury to speculate about the identity of the passenger in the Honda and whether she was

"somehow the owner of the vehicle." Thus, in the context the prosecutor made the comment, it appears he was talking about the passenger testifying, not Kelley.⁷

Also, tellingly, the record indicates that neither the trial court nor Kelley's trial counsel believed the prosecutor was commenting on the fact that Kelley did not testify. In discussing the objections after the conclusion of the closing arguments, the prosecutor stated that he was not commenting on Kelley's failure to testify. The trial court agreed, acknowledging that it did not interpret the prosecutor's argument as commenting on Kelley's failure to testify. Instead, the court stated that it was concerned that the prosecutor was placing the burden on the defendant to present evidence. After this exchange between the prosecutor and the court, defense counsel was given the opportunity to comment. Counsel did not take issue with the prosecutor's claim that he was not commenting on Kelley's failure to testify. Nor did he challenge the trial court's conclusion that the prosecutor was not commenting on the fact Kelley did not testify. Moreover, the court sustained defense counsel's unspecified objection after the prosecutor commented that the defense did not call a witness to say, "that's my car" and later explained it did so because he thought the prosecution's comments were akin to burden shifting. Thus, on the record before us, it appears Kelley's trial counsel did not object

⁷ We address below whether such a comment about the defense not calling a witness constitutes prosecutorial misconduct.

during the rebuttal closing argument on the grounds of *Griffin* error. As such, Kelley forfeited any claim of *Griffin* error here.⁸ (*People v. Turner* (2004) 34 Cal.4th 406, 421.)

D. Prosecutorial Misconduct⁹

A prosecutor's conduct violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Benavides* (2005) 35 Cal.4th 69, 108.) It violates the United States Constitution "when it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) To establish prosecutorial misconduct, a defendant need not show that the prosecutor acted in bad faith, but he must show that his right to a fair trial was prejudiced. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35.) "[O]nly misconduct that prejudices a defendant requires reversal [citation], and a timely admonition from the court generally cures any harm. [Citation.]" (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375; see *People v. Alfaro* (2007) 41 Cal.4th 1277, 1328 (*Alfaro*).

Here, Kelley's trial counsel made two, unspecified objections during the prosecutor's rebuttal closing argument. After the court sustained the first objection, defense counsel requested the court admonish the jury. The court did so as follows:

⁸ In the alternative, even if we were to evaluate Kelley's *Griffin* error claim on the merits, we would find it wanting. Kelley has not shown us there exists a reasonable likelihood that any of the prosecutor's comments *supra* could have been understood by the jury to refer to his failure to testify. (See *Sanchez, supra*, 228 Cal.App.4th at p. 1523; *People v. Clair* (1992) 2 Cal.4th 629, 663.)

⁹ "[T]he term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

"Statements of counsel that's made in closing argument is not evidence, it's not the law. The People have the burden of proving the case beyond a reasonable doubt. You are to follow all of the instructions as a whole and follow the law as I give it to you. Thank you."

"A jury will generally be presumed to have followed an admonition to disregard improper evidence or comments, as '[i]t is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." ' " (*People v. Pitts* (1990) 223 Cal.App.3d 606, 692.) Kelley does not explain why the court's admonishment was not adequate at trial. The trial court sustained Kelley's first objection because it believed that the prosecutor was trying to shift the burden, implying that the defense had to offer evidence. Therefore, the court reminded the jury that the prosecution had the burden of proof and to follow the jury instructions. Kelley does not claim the jury was instructed improperly. And we presume the jury understood and correctly applied the instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 677.) Thus, Kelley has not shown he was prejudiced regarding the comments leading to his first objection.

As to the second objection, we agree with the People that Kelley has forfeited his challenge here. The court sustained his objection, but defense counsel did not ask for an admonition. Moreover, Kelley does not explain here why an admonition would not have cured the alleged harm. Accordingly, he forfeited this claim. (See *Alfaro, supra*, 41 Cal.4th at p. 1328 ["In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review."].)

Further, even if we were to assume the prosecutor committed misconduct, we would conclude that Kelley was not prejudiced. There was no *Griffin* error. The parties do not dispute that the jury was properly instructed. In addition, the trial court admonished the jurors, reminding them that the prosecutor's argument was not evidence, the prosecution had the burden of proof, and to follow the jury instructions. The evidence showed that Anita, not Kelley, owned the Honda. Anita possessed the only two keys to the Honda. When she recovered her car, she found a ring of about 10 keys. Some of the keys were shaved, and some of the keys were to Honda vehicles. Also, Craig testified that shaved keys are often involved in car thefts. When a marked patrol car followed Kelley driving the Honda, Kelley made several turns and ultimately pulled into a residential driveway of a house to which he had no connection. Moreover, Kelley was caught driving the Honda six days after it was stolen. Against this background, we are not persuaded that Kelley's trial was rendered unfair based on the prosecutor's comments during rebuttal closing argument.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.